Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

PHILIP N. THARP,
individually, and as trustee of
PHILIP N. THARP, a purported simple trust
Respondent-Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Complainant-Appellee-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

PHILIP NEVILLE THARP
NON-DOMESTIC MAIL
C/O 10498 HAZELTON ROAD
PEA RIDGE [NEAR 72751]
ARKANSAS

Questions Presented

Subject Matter Jurisdiction—Authority to Sue

1. Was this suit ever authorized?

Subject Matter Jurisdiction—Standing

2. Is Complainant the real party in interest?

Statutory Challenge

3. Does IRC § 6532(b) violate Due Process?

Failure to State a Claim

4. How is either refund erroneous?

5. Is it fraud where Tharp fully disclosed his position?

6. Is it fraud where Complainant fails to review and depends solely on litigation?

§ 455(a) Recusal, *Liljeberg*—Regarding the trial and appellate courts

[Raised first here; triggered by judgment on appeal.]

7. For how much longer will the jurists vilify the law of this state by calling it frivolous?

Parties

The court of appeals judgment sought to be reviewed is from the appeal of the trial court's summary judgment, and the participants in the appellate proceeding are as follows:

Case No. 04-3772

UNITED STATES OF AMERICA (Complainant)

[EILEEN J. O'CONNOR, Asst. A.G.
JONATHAN S. COHEN, DOJ
MARY ROCCAPRIORE PELLETIER, DOJ (sole signatory)]

Philip Neville Tharp

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Citations to decisions below

None

Jurisdiction

(i) Date Judgment Was Entered
24 February 2006 [+90: 25 May 2006]

(ii) Rehearing, Extension None.

(iii) Rule 12.5 N/A

(iv) Statutes, Jurisdiction
Review by certiorari of decision by court of appeals, 28 U.S.C. §§ 1254(1), 2101(c).

(v) Regarding notice of statutory challenge, Rule 29.4(b)
28 U.S.C. § 2403(a) may apply. The initial filing here is served on the Solicitor General. The statutory challenge was raised at trial.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

Key Statutory Language

Title 26

Section 6532. Periods of limitation on suits

(b) Suits by United States for recovery of erroneous refunds

Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

IRC § 6532(b) (West 2002).

Section 7401. Authorization

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

IRC § 7401 (West 2002).

Section 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments

The district courts of the United States [1] at the instance of the United States [2] shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other

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[1] Which, technically, don't exist in this state.

[2] Which entity is not the Complainant, here.

remedies of the United States in such courts or otherwise to enforce such laws.
IRC § 7402(a) (West 2002).

Section 7405. Action for Recovery of Erroneous Refunds.
(a) Refunds After Limitation Period.–Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.
IRC § 7405 (West 2002).

Citations to additional authority

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 5101, 5102, 5103 (2000).

Public Law 105-61, § 641.

Economic Growth and Regulatory Paperwork Reduction Act of 1996, P.L. No. 104-208, § 2609.

The Gold Bullion Coin Act of 1985. P.L. No 99-185 (Dec. 17, 1985), 99 Stat. 1177.

Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).

Coinage Act of 1965, Pub. L. No. 89-81, § 211(a), 79 Stat. 254, 257 (July 23).

H.R.J. Res. 192, 73d Cong. (1933) (enacted) (Sess. I, Ch. 48, June 5) (Public Res., No. 10) (48 Stat. 112, 113 (1933)) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)).

Statement of the Case

Trial Court Jurisdiction

If it exists, 28 U.S.C. § 1333(1), but alleged were §§ 1340, 1345 and 26 U.S.C. § 7405. [3]

Rutherford's Gold Foil Experiment

See, e.g., <http://online.cctt.org/physicslab/content/Phy1/lessonnotes/atomic/atomicmodelsandspectra.asp>.

By our experiences, cause and effect for a lot of things become intuitive. But, sometimes, the actual outcome is so *counter*-intuitive that one needs to update the working theoretical model.

> It was Thomson's model that Rutherford, Geiger and Marsden were testing with their historical gold-foil experiment (1909). Rutherford's plan was to aim alpha particles at a thin gold foil and observe the scattering pattern on a zinc sulfide screen, which would show small bursts of light when struck by an alpha particle. Although the majority of the alpha particles passed through undeflected, some were strongly deflected into hyperbolic paths while others were scattered through almost 180°. *These dramatically recoiled alpha particles led Rutherford to use the analogy of firing bullets at a piece of tissue paper and discovering that some of the bullets bounced back!*

Id. (emphasis added). Another version of Rutherford's description is that it was like firing 16-inch shells at tissue paper, which the tissue paper fired right back.

The best place to start this one is at the end

Dismissal or summary judgment?

What happened? The date is 1 October 2004. The Docket Entries are [42], [43], [44], [45] and the one directly after [45]. Was this case dismissed, per the modification entry, or is there a summary judgment?

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[3] The ***jurisdictional*** provision here is § 7402, not § 7405.

Docket Entry [45] also shows an "Edit Date" of 4 October. Is there a "lack of jurisdiction" dismissal ruling favoring Tharp, or a ruling on the merits favoring Complainant?

Trial court's Notice begs a threshold question.

As follow up to the mandate, the trial court's clerk sent a Notice that included this statement: "**WARNING: CASE CLOSED on 10/01/2004**[,]" which is also the date the Docket Sheet was first treated as non-public. If case-closure justifies a warning, then this most recent Notice once again begs a question Tharp raised from the outset: was this suit ever authorized?

What prompted the confused "authorization"

"Team Law" is confused.

THE LEGAL THEORY.

Tharp acted on the theories advanced by "Team Law." *See* <http://www.teamlaw.org>. How one can (A) arrive at the legal theory they have, and yet (B) get the trust parties' roles exactly backwards, raises questions of the purpose of the "Team Law" effort.

Either way, and in short, the "Team Law" plan includes thoroughly documenting a previously secret trust relation with the Social Security Administration, thereby establishing oneself as a beneficiary, thus, establishing oneself as not liable for "income tax." "Team Law" sees the ALL CAPS NAME as an artificial strawman entity, a simple trust, not the flesh-and-blood man on the land. So, whatever is the liability of the strawman, it stays with the strawman and is not the responsibility of the man.

THE CLAIMS FOR REFUNDS—FULL DISCLOSURE.

After documenting the secret relationship, and clarifying that one is not the strawman entity, the plan then calls for making requests for refunds via 1041's.

One thing about all that is this. Everything "Team Law" talked about was ***fully*** disclosed, via thorough documentation, at each step of the process. Thus, ***fully*** disclosing his position, Tharp submitted his 1041's.

THE TWO REFUND CHECKS.

Tharp received two checks: (1) 27 February 2001, for $4,940 (given to charity); (2) 15 May 2001, for $5,960 ($2,800 to charity). Thus, we're talking $11,000.

The confused "authorization"

The dates—jumping ahead just a little bit.

Given the two-year limitations period for "erroneous refund" claims, even if there *were* basis for such claim, a claim on the first check expired on or about **27 February 2003**; on the second, **15 May 2003**.

Thus, focusing on the "authorization," not only is the "erroneous refund" ***suit***, filed **26 November 2003**, late, twice over, but also the ***"authorization"*** for such suit, dated **17 October 2003**, is just as late, twice over.

So, in short, in October, 2003, Complainant knew or should have known that an "erroneous refund" claim, by itself, could not survive the limitations defense. Yet, the "authorization," facially late for an "erroneous refund" claim, is completely silent regarding any claim of "fraud."

The 8th Circuit understand the substantive difference of the legal theories.

See Wendland & Utz, 351 F.3d at 894 (distinguishing "unilateral mistake" from "fraud").

"ERROR" IS "MY BAD"—UNILATERAL MISTAKE.

To assert "erroneous refund" is to say, "The problem is ***my fault;*** but, it's excusable, and I want my money back."

"FRAUD" IS "YOUR BAD"—SCIENTER.

To assert "fraud" is to say, "The problem is ***your fault!*** You've swindled me, and I want my money back!"

COMPARE AND CONTRAST.

These mutually exclusive legal theories cannot coexist simultaneously. As Tharp asserted from the very outset, Complainant may allege inconsistent legal theories. FED. R. CIV. P. 8(e)(2). But, no "fraud" claim was ever alleged, nor was such even authorized.

The ***sole*** reason the complaint even mentions the term "fraudulently" is the tardiness of the "erroneous refund"

suit. *See* IRC § 6532(b). "Fraud" is nowhere mentioned in IRC § 7405. All that § 7405 talks to is "erroneous refund." And, where the IRS doesn't review the claims, but rather depends on after-the-fact litigation, "fraud" doesn't exist.

The people of Arkansas recognize the capacity issue. *See Jones v. Flowers* (not specifically identified in the opinion is any confirmation of the rumor of the challenge to capacity, by whatever means or language).

Having not yet seen the "authorization," Tharp boldly proclaimed, via his verified First Amended Answer, that there was no way on the planet the suit was authorized.

"AUTHORIZATION" OF AN "ERRONEOUS REFUND" SUIT.

The "authorization" is Complainant's Ex. 3, included in Tharp's appellate Addendum at page A1. As of **17 October 2003**, it authorizes suit under 26 U.S.C. § 7405 (i.e., ***"erroneous refund"***), against "Philip Neville Tharp, individually and in his role as trustee of an alleged trust, identified as PHILIP N. THARP, simple trust[.]" The "authorization" specifically identifies the purported defendant as "Philip Neville Tharp," with an address, thus inhabitance and domicile, in "Pea Ridge, Arkansas."

BUT THE SUIT AS FILED SUGGESTS "FRAUD."

However, asserted plain as day on the face of the unverified complaint, filed **26 November 2003**, is the term ***"fraudulently,"*** which connotes a wholly *different* legal theory from "erroneous refund," against "PHILIP N. THARP, individually and as trustee for PHILIP N. THARP, a purported simple trust, Defendant."

Original and First Amended Answers

Service of Complainant's tardy complaint allegedly occurred as of 7 December, [2], which puts the response time smack in the heart of the Christmas season. Originally, Tharp responded timely to avoid default. And, rather instantly thereafter, he amended his Answer (which originally included a counterclaim) by way of another verified Answer (which asserted no such claim).

Timing was such that Tharp's First Amended Answer, [8], was filed on the same day as the Scheduling Order, [7].

The trial proceedings

Where the trial court has no jurisdiction, is the alleged "defendant" a "party?"

Tharp filed multiple motions to dismiss, all of which were denied, at least at first. As of 1 October, there is evidence indicating that someone rethought those motions and entered a proper ruling, after all.

In the interim, Complainant pursued discovery, which specifically applies only to "parties." Tharp declined to participate, given the court's lack of jurisdiction, thus the fact he simply was not a "party." At one point in there, Complainant's trial counsel got so frustrated that some tax-protesting moron *pro se* from hickville Arkansas *wasn't* quaking in his boots when he commanded, "Jump!" that he called and left a message ***on the recorder*** that he was with the Criminal Investigation Division, which fact such counsel denies, of course. But, in the bigger picture, this debt collection practices violation is *nothing*. Between the glaring problems with (A) the Summons (no proper seal), (B) service of Summons (Tharp is party to no known agreement that reaches inhabitants of Arkansas), [4] (C) the *eo nominee* issue (suit to be filed in the name of the United States), (D) the real party in interest problem (Complainant has no known injury in fact regardless of what Tharp did or didn't do), (E) the Rule 11 signature authority problem (did BROWN, and then VAN HOEY, represent "United States," per the signature block, or Complainant?), [5] (F) the lack of authorization problem, §§ 7401, 7403 (by his Rule 12(b)(2) motion, Tharp declined to animate the capacity asserted in the complaint), and, if

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[4] *Cf.* 40 U.S.C. §§ 3111, 3112.

[5] Tharp also asserted a McDade Act violation, which is not reasserted here, given the Separation of Powers problem incumbent in the McDade Act as it applies to a threshold "admissions" question.

it's possible to reach the merits, (G) the limitations problem, it's difficult to figure how Tharp is a "party," at all, but even if he were, how discovery, much less trial, could possibly be justified over Tharp's objections and his motions to dismiss.

Mandamus was denied, but it triggered the first bright spot in the proceedings.

There were so many rulings contrary to the law of this state that Tharp sought mandamus. That was denied, but the effort triggered the first bright spot in the proceedings. Upon denial of mandamus, the trial court formally initiated settlement proceedings. This involved the interaction of the magistrate. She was given an impossible task, for DOJ had no intention of anything except crushing Tharp, thus "Team Law" with him. And it seems that no one, save the magistrate, had a clue what Tharp was talking about. It was a great idea, but it came too late. Tharp formally objected to the involvement of any magistrate, and, in the end, both parties asserted that settlement wasn't going to happen.

Damn the torpedoes! Full Steam Ahead!

Given the nature of the defense, Tharp even suggested that the matter wait at least until after the elections (November, 2004), but, trampling that idea under foot, DOJ and the trial court pressed forward. DOJ filed their summary judgment, and the trial court granted it. But ...

The confused rulings

What *was* the final ruling? If the case was dismissed, then there is no judgment against Tharp, in any capacity. If it was ruled on, then the trial court completely ignored, among other things, the evidentiary nature of the verified First Amended Answer in entering summary judgment. Since the case was set for jury trial, that ruling denied Tharp's access to the jury.

Further, and all under color of law and office, DOJ requested, and 8th Circuit granted, sanctions, because Tharp argued the law of this state.

Argument

Remedies Requested

Vacate.

Given the confusion of the trial rulings, and Tharp's motion to annul the appeal, where the case is dismissed and where DOJ filed no Notice of Appeal and no cross-appeal, the judgment on appeal may simply be vacated.

Reverse.

If the merits *may* be reached, then the judgment is properly reversed, since the suit was filed late.

Summary

Jurisdiction.

The suit filed was never authorized. If it was authorized, the trial court still never had jurisdiction.

Merits.

If jurisdiction exists, then summary judgment would have been proper, had it been granted to *Tharp* via his motion for judgment on the pleadings. Otherwise, Tharp should have been allowed access to the jury.

Sanctions.

And, even if all of Tharp's motions fall short, there's no way on this planet that his position is, in any way, shape, manner or form, lawfully subject to sanctions. The level of systemic confusion among the jurists regarding the law of this state on "tax" matters, which confusion is self-proved in the Fifth, Ninth, Eleventh, and now also the 8th, Circuits, so far, is clear evidence of the systemic Due Process (vagueness) problem. If the goose obtains to an ignorance of the law defense, then so does the gander.

A case of conundrums and contradictions

The gold clause cases.

The 8th Circuit, as do the Ninth Circuit, understand well the gold clause matters, which makes all the more mind-boggling the fact that they understand the "tax" system not at all.

The gold foil analogy, among others.

By analogy, these jurists, trial and appellate, fully expected ***all*** the alpha particles to go straight through the gold foil. So, when Tharp started pointing out that some alpha particles reflected right back at the source, these jurists considered him madder than a hatter, and they proceeded to steamroll him with their less than fully informed perspectives. But, none of that changes the facts, in particular those asserted via his verified First Amended Answer. His subsequent motions should have resulted in dismissal, judgment on the pleadings, or trial. The jurists applaud the Emperor's new clothes, which alleged new clothes Tharp doesn't see.

Subject Matter Jurisdiction—Authority to Sue

1. Was this suit ever authorized?

The suit filed is not the suit "authorized."

The letter purports to satisfy §§ 7401, 7403. However, the suit filed is not the suit "authorized."

"Erroneous refund" versus "fraud."

Among the critical differences is the distinction between a § 7405 "erroneous refund" claim, ***"my fault,"*** and a "fraud" claim, ***"your fault,"*** which "fraud" theory is nowhere mentioned in § 7405.

Limitations issue.

If the suit filed *is* the suit "authorized," then the claims sound in "erroneous refund," per § 7405. Such claims expired months before the "authorization" existed, much less the suit was filed. Whether a limitations provision can morph a claim solely for limitations purposes is addressed in Question 3. Here, the focus is that if a "fraud" claim was to be asserted, for any reason, then such had to be authorized. Since all that is "authorized" is § 7405, which nowhere includes "fraud," it follows that "fraud" was never authorized, rendering the suit filed as late, if jurisdiction even existed.

Subject Matter Jurisdiction—Standing

2. Is Complainant the real party in interest?

There is no evidence indicating any injury in fact is even possible for Complainant to incur. Tharp asserted his Rule 17 position, and no party with any injury in fact was substituted in. *Lujan*, 504 U.S. at 559-62; *Phillips Petroleum*, 472 U.S. at 803-04. *See also Hunt*, 432 U.S. 333; *Allen*, 468 U.S. at 750-52; *FEC v. Akins*, 524 U.S. at 19-26 (injury in fact; specific statutory provision).

Statutory Challenge

3. Does IRC § 6532(b) violate Due Process?

Can a claim be morphed into a hybrid solely for limitations purposes?

If so, then Complainant's read and application of this limitations language is just fine. But, if not, and if this case wasn't dismissed, then the summary judgment doesn't just violate Due Process; the ruling ***defies*** it.

A third view is this. By common sense, this language may be construed to say this: (A) IF "unilateral mistake" triggers the refund, THEN the limitations period is two years, and (B) IF "fraud" triggers the refund, THEN the limitations period is five years. This isn't a literal read of that language, but it's the one view that makes sense. In this view, a summary judgment for Complainant still ***defies*** Due Process.

Either (A) Complainant's position or (B) IRC § 6532(b) is schizophrenic and Hegelian.

The discussion in *Wendland & Utz* proves the problem of this limitations language. Generically, the facts will establish either "my fault" or "your fault." The ***instant*** the facts move away from "my fault," the legal theory moves away from "erroneous refund." Thus, while there's no question different legal theories obtain to different

limitations periods, one ventures into fantasy-ville to suggest that the limitations period for one theory applies to another theory, based solely on the fact that both theories are mentioned in the same subsection defining the respective limitations periods.

The mere ***thought*** that the same claim has one analysis for the merits, but another analysis solely for limitations purposes, is nuts. Complainant's position, fully supported by both the trial and appellate courts, suggests that § 6532(b) allows the schizophrenic, Hegelian, centaur-like, minotaur-like, manticora-like, morphing of an "erroneous refund" claim, magically giving it a minotaur's head just long enough that the two-year limitations period be made into five. Then, just as magically, the "erroneous refund" claim returns to being just that, an "erroneous refund" claim, a claim that in all other circumstances, has a two-year limitations period.

Putting key pieces together.

WHAT WAS AUTHORIZED?

An "erroneous refund" suit against an inhabitant of Arkansas named Philip Neville Tharp.

WAS SUCH SUIT TIMELY?

Since such suit has yet to be filed, much less served, such suit is late.

HOW COULD § 6532(B) POSSIBLY EXTEND THE DEADLINE FOR AN "ERRONEOUS REFUND" CLAIM?

Where a "fraud" claim is also authorized, and pled, then § 6532(b) would permit the filing of such claim for up to five years. But nothing about that reality alters either (A) the nature of the "erroneous refund" claim or (B) its two-year limitations period. So, there's nothing about § 6532(b) that extends any deadline for a § 7405 suit. If § 6532(b) may be read otherwise, it violates Due Process.

"Erroneous refund" is simply not a "fraud" case, for ***any*** purpose, including "authorization" and limitations. *Accord Cotler*, 184 F.2d at 171-76 (evidentiary standard for "fraud" is "clear and convincing"). *See Paulson*, 78

F.2d at 99 ("error" defined). "The elements of fraud must be pleaded with particularity. Fed. R. Civ. P. 9(b)." *Flora*, 260 F. Supp. 2d at 786. In Complainant's unverified complaint, "fraudulently" is mentioned liberally, but solely *en passant*, i.e., solely for limitations purposes.

Either the claim is "erroneous refund" for all purposes, or it's "fraud," for all purposes. The "authorized" "erroneous refund" claim expired months before the "authorization" even existed. The never-"authorized" "fraud" claim was also never competently alleged. But, by application of a schizophrenic, Hegelian read of the limitations language, the "erroneous refund" claim was morphed into a minotaur-like "fraud" claim just long enough to obtain to a ***five***-year limitations period.

Summary.

NOTHING IS WRONG WITH § 6532(b).

Read with common sense, § 6532(b) sets up two different limitations periods, one for each of two different legal theories. An "erroneous refund" claim has a two-year period; a "fraud" claim, a five-year period. In this view, there's nothing wrong with the statute.

THE § 7405 SUIT IS SIMPLY TOO LATE.

Assume jurisdiction. To apply the commonsense reading, the § 7405 suit discussed in the "authorization" wasn't even "authorized" timely, much less filed timely.

ANY OTHER READING CREATES A MORPHED CASE.

Per the present ruling, an "erroneous refund" claim may be morphed, at will, into a "fraud" claim, solely for limitations purposes. This violates Due Process.

Failure to State a Claim

4. How is either refund erroneous?

Burden of Proof.

Complainant never even alleged, much less proved, that the original gift over was lawfully required. Where

the original gift over wasn't a required distribution, the refund *ain't* erroneous.

While it is indisputable that a fiduciary carries the burden to show compliance with the trust indenture, 2A SCOTT ON TRUSTS § 172, at 452-53; BOGERT § 861 at 2-3, it's just as indisputable that such burden doesn't even exist until *after* the beneficiary carries the threshold burden to show (1) that the claimant is a beneficiary, (2) of a trust with a trust *res*, (3) managed by the alleged fiduciary. "The burden of proof is on the party who asserts the existence of a trust." BOGERT § 50 at 102.

> A beneficiary seeking to obtain relief for a breach of trust must plead and prove facts which show the existence of a fiduciary duty and the failure of the trustee to perform it, and that consequently the court should grant the requested remedy.

BOGERT § 871 at 156 and nn.2, 3 (where beneficiary fails to prove damages, there is no recovery). "If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will [*then*] shift to the trustee." *Id.* at 156-57. Thus, the *threshold* burden is on the party claiming to be a beneficiary.

> Where, as is usual, the creation of the trust is by way of gift, the relationship between the settlor and beneficiary may influence a court in deciding whether a trust intent existed. If the parties are on bad terms, as where the alleged beneficiary has been mistreating the supposed settlor, the creation of a trust is rendered unlikely.

BOGERT § 50 at 108.

Unknown beneficiary.

Even where an agreement is proved up, which hasn't happened here, the only named beneficiary is "United States." 31 U.S.C. § 321(d); 42 U.S.C.A. § 1320b-9(k). Complainant is not so named.

> If there is a lack of any presumption of death or grant of power to pay a substitute, the trustee may pay the

> funds to any alleged successor of the absentee [beneficiary] at this peril *or hold them indefinitely*, unless he can secure protection by court order.

BOGERT § 814, at 314 (emphasis added).

Therefore, where the alleged fiduciary faces the "unknown beneficiary" problem, and where there is no competent evidence of any claim, a wrongful distribution could constitute a misappropriation of trust property. Where a fiduciary misappropriates trust property, there's a potentially serious problem called "embezzlement." ARK. CODE ANN. § 5-36-103.

Pollock I (fiduciaries may not divert funds to unnamed beneficiaries) asserts an eternal legal truth, and it is still a serious matter for a fiduciary to engage in (willful) misappropriation, whether voluntarily or under coercion. Where that coercion exists under color of law, additional problems arise.

Disclaimer.

"Conduct of the alleged beneficiary inconsistent with the creation of a trust may be addressed to rebut proof of a trust." BOGERT § 50 at 114-15.

> In the absence of a statute governing the matter, the problem is often whether the beneficiary by his words or other conduct [*accepted* the equitable interest], or has indicated that he rejected such benefits. Since acceptance is normal, a claim of renunciation must be supported by clear evidence.

BOGERT § 170, at 205 (Proof of Acceptance or Disclaimer). *See* BOGERT §§ 170-72 (disclaimer and its effect).

Here, given the vituperation at trial and the sanctions on appeal, the Record has abundantly clear evidence of such inconsistent conduct (disclaimer). There is no evidence that Complainant is the or even a beneficiary of any underlying fiduciary obligation at issue, and all DOJ, the trial court, *see, e.g.*, [17], [24], [45], and the appellate court can think to do is vilify Tharp for raising the issue.

Conduct by the beneficiary which is inconsistent with

a trust for his benefit may amount to an implied disclaimer. ... Statutes which require "surrender" of such trusts to be in writing do not apply, since a surrender is based on a giving up of an existing equitable interest, whereas a disclaimer amounts to a refusal to accept a gift of an equitable property right.

BOGERT § 170, at 207. Beneficiary status starts on the date of creation of the trust. Disclaimer operates *nunc pro tunc* to that same date. BOGERT § 172, at 227-28. So, whatever obligation did or didn't exist at the beginning, sure doesn't exist now!

5. Is it fraud where Tharp fully disclosed his position?

How is it ***possible*** for Complainant to allege the facts alleged, but for Tharp's ***full*** disclosure of his position? And, the use of a 1041 is absolute disclosure of Tharp's understanding that the "income tax" obligation is a fiduciary obligation. ***This*** has been the stumbling block for everyone on Complainant's side; ***this*** is the alpha particle that came rebounding out of the gold foil right back at the alpha particle source. The misunderstanding on ***this*** point is, without question, the basis for the sanctions, and, as such, is the point that can best be resolved via review of this case.

6. Is it fraud where Complainant fails to review and depends solely on litigation?

On appeal, Tharp discussed several elements of "fraud," and two of the most efficient elements are these.

Justifiable Reliance—Generally.

The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it, if, but only if,

(a) he relies on the misrepresentation in acting or

refraining from action, and

(b) his reliance is justifiable.

DECEIT § 537 at 80 (Justifiable Reliance. General Rule).

The IRS promotes itself commercially as "the" expert in matters of "income tax." So, it's the height of absurdity for the IRS to turn around and tell anyone, ***especially*** a federal judge, that it "justifiably relied" upon ***anything*** as ***fully disclosed*** as ***these*** documents that it would later want to call "frivolous." Tharp used nothing but IRS forms and IRS information (1041's and W-2's). If there were some factual misstatement, i.e., something not already known to the IRS, i.e., a "latent defect," then there could be a legitimate basis, generically, to assert misrepresentation. But, no such facts ***remotely*** exist, here. There was ***nothing*** hidden or withheld in the way of information. ***Nothing***. Complainant can in absolutely, positively no way under the sun come anywhere ***near*** being able to say the same, as Tharp discussed on appeal.

Justifiable Reliance—Reliance upon Lawsuit.

The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity.

DECEIT § 548 at 106 (Reliance on Action for Misrepresentation).

In order to justify recovery, the recipient of a misrepresentation must rely upon the truth of the misrepresentation itself, and his reliance upon its truth must be a substantial factor in inducing him to act or to refrain from acting. (See § 546). It is not enough that, without belief in its truth, he proceeds to enter into the transaction in the expectation that he will be compensated in an action for damages for its falsity.

Id. (Comment a.).

Flora cites DECEIT § 552 in the discussion regarding reasonable reliance. *Flora*, 260 F. Supp. 2d at 785-86. Key in *Flora* is the absence of expertise for the subject matter of the transaction at issue. *Id.* at 785. Here, where *is* all the alleged "expertise" in the area of "income tax?" Thus, where Complainant neither pleads nor proves ***any*** reliance upon Tharp's position, there simply is no "fraud" case. Something else fully evident in *Flora*, and interestingly absent in this case, is the absence of reference to state (Arkansas) law regarding "fraud." In *Flora*, the trial court is very clear about the applicable requirements from the Minnesota law. *Id.*

What the IRS used to do, up until Tharp asserted his position in this very case, was, ***first***, issue the refunds requested, and ***then*** evaluate the requests. Confirmed by newspaper articles published on or about 26 January 2006, the IRS has ***changed their policy!*** They claim they were about a year and a half into the new policy, which put the start time about June, 2004. Tharp can't possibly be the only one asserting such defense, but the timing is most interesting. Today, they at least purport to evaluate first, and *then* issue the refunds, or not, as the case may be. But, at the time of this suit, the IRS was 100% dependent upon litigation after-the-fact.

Summary.

Tharp can discuss "fraud" at length with Complainant, and Complainant will not like where that road leads. Here, it is efficient simply to point out how utterly ***absurd*** it is for Complainant to assert that the IRS is somehow fraudulently induced ***by its own forms and information! What can possibly be more obvious?*** Really, **how many "simple trusts" get W-2's??!!** [6]

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[6] From an informed perspective, i.e., "taxpayer" means "fiduciary," it's a ***huge*** number. So, what in the world is the problem? From an "educated" perspective, we probably can count the number on one hand. So, if it is wrong, where's the justifiable reliance? If the position is so "obviously" "frivolous," why did the IRS write the check***S***?

To apply the traditional, "educated," systemic view, "Team Law" didn't know better. Tharp didn't, at the time, either. BUT THE IRS MOST CERTAINLY DID! So, if it's wrong, even if a "fraud" suit *had* been "authorized,' and even if the trial court *had* jurisdiction, THERE IS NO JUSTIFIABLE RELIANCE, here.

The fact that Complainant has no justifiable reliance ***to*** assert is judicially confessed by its asserting none, and, ultimately, Complainant also has relied solely on litigation after-the-fact.

Tharp might say here that there is no "fraud," but he can't, for that examines only his side of the case. To be sure, for all eternity, there is, absolutely, massive "fraud" going on by one of these litigants, ***and it ain't Tharp!***

§ 455(a) Recusal, *Liljeberg*—Regarding the trial and appellate courts

[Raised first here; triggered by judgment on appeal.]

7. For how much longer will the jurists vilify the law of this state by calling it frivolous?

Patience, here, is very close to exhaustion. Jurists who despise the law ***this*** much should consider career changes.

Litigants can no more be compelled to argue their *appeal* before biased jurists than they may be compelled to *trial* before biased jurists. § 455(a). *Liljeberg*.

Any remand should go to a different panel, or else straight to a reassigned trial court for confirmation of the dismissal.

In sum—Clearing the Clouds of Confusion

Confusion all around.

"Babylon," as in "babble on," means "confusion." "Team Law" is confused. Tharp was confused. But, who can blame them, given the massive, systemic, "100-year" confusion within the IRS and DOJ, and even within the judiciary. And, then, in this case, there ended up being two "final judgments." So, where does that leave us?

Burden of Proof.

A really good place to start is with burden of proof. And, first out of the chute is authority to bring this suit at all. If there is any, then next is standing. Then, we can analyze Tharp's motions to dismiss to determine whether the trial court ever had jurisdiction. If so, then we can analyze Tharp's motion for judgment on the pleadings, given that (A) the "erroneous refund" claims are, on their face, late, not only in filing, but also in "authorization," and (B) not only is there no "fraud" case "authorized" or pled, but also, given Tharp's verified pleading, summary judgment ***against*** Tharp is a legal impossibility.

The suit filed was never authorized—Direct Conflict With Federal Standards.

The 8th Circuit have determined that the case ended with summary judgment for Complainant. This result is laced with their ad-hominem attitude, perspective and demeanor against *pro se*'s, especially those who demand application of *the law*, which approach simply amplifies and encourages the trial court's manifest inclination in the exact same direction. The appellate court's ethically sanctionable departure into extortionate "sanctions" awards, conflicts with (1) the truth, (2) the ancient Common Law and additional foundational law of this state, (3) longstanding federal statutory provisions, (4) relevant decisions of this Court, (5) a litigant's right to meaningful access and meaningful opportunity to be heard, (6) relevant decisions of the 8th Circuit and (7) relevant decisions of other courts of appeals.

Thus, the 8th Circuit have (A) engaged in ethically sanctionable conduct, (B) entered an opinion that conflicts with the very foundation of this state, generally, and the "tax" system, in particular, (C) entered an opinion that overtly and egregiously conflicts with relevant decisions of this Court, as well as with relevant decisions of other courts of appeals, and even their own, and (D) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the trial court, as to call for the exercise of this Court's supervisory power.

Since this case was properly dismissed, where the courts hold themselves out as capable of affording competent arbitration of the matter, Tharp wants his filing fee with the 8th Circuit returned.

Complainant never had standing—Direct Conflict With Federal Standards.

The 8th Circuit have refused to compel Complainant to prove its standing, thus have entered an opinion that (A) conflicts with law of this state, generally, and the "tax" system, in particular, (B) conflicts with relevant decisions of this Court, as well as with relevant decisions of other courts of appeals, and (C) so far departs from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the trial court, as to call for the exercise of this Court's supervisory power.

Legal theories don't morph for any purpose, including limitations provisions—Important Question of Federal Law.

Whether IRC § 6532(b) allows morphing an "erroneous refund" claim into a "fraud" claim, solely for purposes of calculating the statute of limitations period, is an important question of federal law that has not been, but should be, decided by this Court.

No claim for relief stated—Direct Conflict With Federal Standards.

The 8th Circuit refused to compel Complainant to state a claim for relief. Since Complainant failed to satisfy its threshold burden of proof, there was ***no error***, at all, and, no "fraud" claim was even remotely authorized, much less alleged. Key here, among the elements of "fraud," are (A) the absurdity of suggesting "justifiable reliance," at all, coupled with (B) the overt intent to rely solely on litigation after-the-fact. Thus, the 8th Circuit have entered an opinion that (A) conflicts with law of this state, generally, and the "tax" system, in particular, (B) conflicts with relevant decisions of this Court, as well as with relevant decisions of other courts of appeals, and (C) so far departs from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the trial court, as to call for the exercise of this Court's supervisory power.

This oath- and law-defying sanctions binge ***will*** stop—Direct Conflict With Federal Standards.

Leading the way, here, are FOLEY, in the Wallis case ("taxpayer" means "fiduciary"), Docket 8244-04 (USTC), No. 06-60256 (5th Cir.) (pending) (sanctions moved for twice and denied twice), and the Fifth Circuit in the Florance case, No. 05-60552 (5th Cir. 29 Mar 2006) (unpublished) ("taxpayer" means "fiduciary") (no (more) sanctions). Regarding the Florance decision, Stearman v. SMITH, et al., No. 3:06-CV-273-L (N.D. Tex. Dal. Div.) ("taxpayer" means "fiduciary") was filed 13 Feb., and Wallis filed his appeal that next week.

The appellate court's ethically sanctionable departure into extortionate "sanctions" awards, conflicts with (1) the truth, (2) the ancient Common Law and additional foundational law of this state, (3) longstanding federal statutory provisions, (4) relevant decisions of this Court, (5) a litigant's right to meaningful access and meaningful opportunity to be heard, (6) relevant decisions of the 8th

Circuit and (7) relevant decisions of other courts of appeals.

Thus, the 8th Circuit have (A) engaged in ethically sanctionable conduct, (B) entered an opinion that conflicts with the very foundation of this state, generally, and the "tax" system, in particular, (C) entered an opinion that overtly and egregiously conflicts with relevant decisions of this Court, as well as with relevant decisions of other courts of appeals, and even their own, and (D) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the trial court, as to call for the exercise of this Court's supervisory power.

Since this case was properly dismissed, where the courts hold themselves out as capable of affording competent arbitration of the matter, Tharp wants his filing fee with the 8th Circuit returned.

Remedies Requested

Tharp requests

1. That this Court grant this petition, issue the writ of certiorari and take jurisdiction of this matter;
2. That this Court vacate the judgment on appeal, or, if there is jurisdiction, reverse, and then remand with instructions confirming the validity of the dismissal;
3. The opportunity to brief any additional issues the Court may identify;
4. The non-argument calendar. Oral argument is not expected to aid in the resolution of these issues;
5. That costs be taxed to the 8th Circuit and DOJ, jointly and severally; and
6. Any and all other relief at law, in equity or sui generis to which he may show himself justly entitled.

Respectfully submitted,

Philip Neville Tharp
Without prejudice
Without the United States
non-domestic mail
c/o 10498 Hazelton Road
Pea Ridge [near 72751]
Arkansas

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Rule 14.1(i)(i)—Appellate Opinion

2006 Feb 24

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3772

United States of America, Appellee,	*	
v.	*	Appeal from the United
Philip N. Tharp, individually and as trustee for Philip N. Tharp, a purported simple Trust, Appellant.	*	States District Court for the Western District of Arkansas.
	*	[UNPUBLISHED]

Submitted: February 21, 2006
Filed: February 24, 2006

Before RILEY, MAGILL, and GRUENDER, Circuit Judges.

PER CURIAM.

Philip Tharp (Tharp) appeals from the district court's[1] adverse grant of summary judgment in this action by the United States to recover erroneous income tax refunds. The government has filed a motion for sanctions to cover some of its expenses in defending this suit. [12]

After de novo review, see Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 982 (8th Cir.), cert. denied, 543 U.S. 991 (2004), we conclude the grant of summary judgment was proper for the reasons explained by the district court.

[1] The Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas.

Accordingly, we affirm. See 8th Cir. R. 47B.

Regarding the request for sanctions, we may award "just damages" and single or double costs if we determine an appeal is frivolous. See 28 U.S.C. § 1912; Fed. R. App. P. 38. In this case, we find Tharp has filed a frivolous appeal raising tax-protester arguments of the kind he unsuccessfully raised below. Under these circumstances, we conclude sanctions are appropriate. See United States v. Gerads, 999 F.2d 1255, 1256-57 (8th Cir. 1993) (per curiam) (when appellant brought frivolous appeal based on tax-protester argument, court granted government's motion for sanctions).

Accordingly, we award the government $5000 in damages.

Rule 14.1(i)(ii)—Additional Orders

8th Circuit—Denial of Motion to Annul

Due to the confusion of the result, Tharp appealed to preserve that interest, and then filed a motion to annul the appeal to preserve that interest. The appellate court denied Tharp's motion to annul.

Trial Court—Opinion for Summary Judgment

U. S. DISTRICT COURT [1]
WESTERN DISTRICT ARKANSAS
FILED
OCT 0 1 2004
CHRIS R. JOHNSON, CLERK
BY /s/
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**
v. **Civil No. 03-5283**
PHILIP N. THARP, Individually and as Trustee for PHILIP N. THARP, a purported simple trust **DEFENDANT**

MEMORANDUM OPINION

Now on this 1 day of October, 2004, comes on for consideration the **United States' Motion For Summary Judgment** (document #36), to which defendant has failed to make response, and the Court, having fully considered the documentation in support of said motion, finds and

[1] [N.B. Filestamp is actually on the last page.]

orders as follows:

1. This is a suit to recover taxes alleged to have been erroneously refunded to defendant, brought pursuant to **26 U.S.C. §7405**. Plaintiff alleges that defendant submitted two fraudulent tax returns claiming entitlement to tax refunds on behalf of a non-existent trust, when in fact the income reported on those returns was defendant's income in his individual capacity, based upon which he was not entitled to the refunds. Plaintiff alleges that it erred in paying the refunds pursuant to the tax returns.

Defendant answered, admitting some of the material allegations of the Complaint and denying' others. Plaintiff now moves for summary judgment on the allegations of the Complaint. Defendant has failed to respond, unless one can count a document filed shortly before the pending motion entitled "Tharp's [12] Objection To All Orders," in which he states that he "objects to all of the court's orders to date, past, present and future ...." Even were this curious document to be considered a response to the pending motion, however, it is accompanied by no documentation that would support any position taken by defendant in this case.

2. Summary judgment should be granted when the record, viewed in the light most favorable to the nonmoving party, and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. **Walsh v. United States**, 31 F.3d 696 (8th Cir. 1994). Summary judgment is not appropriate unless all the evidence points toward one conclusion, and is susceptible of no reasonable inferences sustaining the position of the nonmoving party. **Hardin v. Hussmann Corp.**, 45 F.3d 262 (8th Cir. 1995). The burden is on the moving party to demonstrate the non-existence of a genuine factual dispute; however, once the

moving party has met that burden, the nonmoving party cannot rest on its pleadings, but must come forward with facts showing the existence of a genuine dispute. [2] **City of Mt. Pleasant, Iowa v. Associated Electric Co-op**, 838 F.2d 268 (8th Cir. 1988).

3. Pursuant to **Local Rule 56.1**, the United States filed statements of facts which it contends are not in dispute. Defendant has not controverted any of those facts, either when presented to him in the form of Requests For Admissions pursuant [⊥3] to **F.R.C.P. 36** or when presented in plaintiff's Statement Of Material Facts. [3] From these uncontroverted sources, and from the documentation attached in support of plaintiff's motion -- the authenticity of which is not disputed -- the following significant undisputed facts are made to appear:

* On or about October 17, 2000, defendant filed a tax form ("Form 1041"), claiming a tax refund on behalf of a purported trust identified as "PHILIP N. THARP" for tax year 1997 in the amount of $4,811.00.

* On or about October 18, 2000, defendant filed a second Form 1041, claiming a tax refund for PHILIP N. THARP for tax year 1999 in the amount of $5,700.00.

* Both Forms 1041 identified PHILIP N. THARP as a "simple trust."

* Both Forms 1041 were signed "Philip Neville Tharp TTEE."

* Both Forms 1041 gave the Employer Identification number of the purported trust as 527-88-8930.

* The income alleged to have been received by the

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[2] [N.B. *See* Tharp's verified First Amended Answer.]

[3] [N.B. True. They're already controverted by the verified Answer.]

purported trust for tax year 1997 was in the amount of $38,660.00, said to have come in the form of "W2 wages."

* The purported trust was said to have paid $38,660.00 in fiduciary fees for tax year 1997.

* According to his own Form W2, defendant received $38,660.64 in taxable wages from Osage Valley Electric [⊥4] Cooperative Association ("Osage Valley") for tax year 1997.

* The tax refund claimed for the purported trust for 1997, $4,811.00, was 8 cents less than the amount withheld by Osage Valley from defendant's wages for tax year 1997.

* The income alleged to have been received by the purported trust for 1999 was $44,581.00, said to have come in the form of "W2 wages."

* The purported trust was said to have paid $44,581.00 in fiduciary fees for tax year 1999.

* According to his own Form W2, defendant received $44,581.77 in taxable wages from Osage Valley for tax year 1999.

* The tax refund claimed for the purported trust for 1999, $5,700.00, was 33 cents less than the amount withheld by Osage Valley from defendant's wages for tax year 1999.

* Defendant's Social Security number is 527-88-8930.

* As a result of the Form 1041 for 1997, on February 27, 2001, the government issued a check in the sum of $4,940.62 to "PHILIP N. THARP TR, THARP PHILIP NEVILLE TTEE." Defendant negotiated this check.

* As a result of the Form 1041 for 1999, on May 15,

2001, the government issued a check in the sum of $5,960.04 to "PHILIP N. THARP TR, THARP PHILIP NEVILLE TTEE." [⊥5] Defendant negotiated this check.

* The government submitted Requests for Admission to defendant, asking that he admit that the PHILIP N. THARP simple trust has never existed; that the purported trust did not receive income from any source in 1997 or 1999; that the purported trust did not have any taxes withheld for those years; that it did not pay fiduciary fees to anyone during those years; and that defendant intended to deceive the IRS when he filed the Form 1041. Defendant did not deny any of these Requests for Admission. [4]

4. When one considers the foregoing undisputed facts, there is no genuine dispute about what occurred. For each of the two tax years in question, defendant filed a Form 1041 showing that a simple trust, identified by his name and Social Security number, earned income in the form of W2 wages identical to the W2 wages of defendant. The Forms 1041 also showed that the full amount of that "income" was paid out in fiduciary fees. On that basis, defendant claimed that the purported trust was entitled to a tax refund in the amount of taxes paid by defendant for those tax years.

The purported trust, however, did not exist. It was a sham, used to deceive the government so that it would issue the tax refunds. Were there in fact a trust named PHILIP N. THARP, it [⊥6] would have been a simple matter for defendant to produce the documents establishing it. He produced no such documents. He also

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[4] [N.B. If all of these facts are admitted as true, then Complainant has just proved that Tharp never had an "income tax" obligation in the first place! If these are admitted as true, the refund is not in error.]

failed to deny Requests For Admissions stating that the PHILIP N. THARP simple trust has never existed; that the purported trust did not receive income from any source in 1997 or 1999; that it did not have taxes withheld during those years; that it did not pay fiduciary fees to anyone during those years; and that he intended to deceive the IRS when he filed the Forms 1041. These Requests For Admission are therefore deemed admitted by operation of law, pursuant to **F.R.C.P. 36**. Defendant has also failed to come forward with any evidence in response to the Motion For Summary Judgment that would show the existence of the purported trust.

The government erroneously issued checks in response to the fraudulent Forms 1041. One check was for $4,940.62, which was the total of the amount of the refund ($4,811.00) plus interest ($129.62). The other check was for $5,906.04, which was the total of the amount of the refund ($5,700.00) plus interest ($260.04). Defendant cashed these checks.

Defendant failed to counter the government's evidence in this case with even a scintilla of evidence in his favor. [5] He produced no documents at the time of initial disclosures, failed to respond to discovery, and failed to respond to the Motion For Summary Judgment. There is thus no evidence susceptible of any inference in favor of the defendant. [6] The Court therefore finds that the [⊥7] Motion should be granted.

5. Plaintiff suggests a computation of interest that had accrued on the erroneous tax refunds as of September 7, 2004, pursuant to **28 U.S.C. §6602** and **28 U.S.C. §6621**, in the sum of $2,291.99. Defendant does not contest this

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[5] [N.B. Even the Original Answer was verified, as was the First Amended Answer.]

[6] [N.B. The only possible way to assert this in clear conscience is to fail to read Tharp's First Amended Answer.]

computation, and it is accepted by the Court.

IT IS THEREFORE ORDERED that the **United States' Motion For Summary Judgment** (document #36) is **granted**, and judgment will be entered in favor of plaintiff for the sum of $13,192.65.

IT IS SO ORDERED.

/s/ JIMM LARRY HENDREN
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

Trial Court—Judgment

U. S. DISTRICT COURT [7]
WESTERN DISTRICT ARKANSAS
FILED
OCT 0 1 2004
CHRIS R. JOHNSON, CLERK
BY */s/*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**
v. **Civil No. 03-5283**
PHILIP N. THARP, Individually and as Trustee for PHILIP N. THARP, a purported simple trust **DEFENDANT**

JUDGMENT

Now on this *1* day of October, 2004, for the reasons set forth in a Memorandum Opinion entered contemporaneously herewith, the Court enters judgment in favor of the plaintiff and against defendant in the sum

[7] [N.B. Filestamp is actually at the foot of the page.]

of Thirteen Thousand One Hundred Ninety-Two and 65/100 Dollars ($13,192.65), with interest pursuant to **26 U.S.C. §6602** and **6621** and **28 U.S.C. §1961(c)(1)** until paid.

IT IS SO ORDERED.

/s/ JIMM LARRY HENDREN
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

This document entered on docket in compliance with Rule 59 and 79 (a), FRCP.

on *10-1-04* by */s/*

Trial Court—Supplement to Record

U. S. DISTRICT COURT [8]
WESTERN DISTRICT ARKANSAS
FILED
OCT 0 1 2004
CHRIS R. JOHNSON, CLERK
BY */s/*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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UNITED STATES OF AMERICA **PLAINTIFF**
v. **Civil No. 03-5283**
PHILIP N. THARP, Individually and as Trustee for PHILIP N. THARP, a purported simple trust **DEFENDANT**

[8] [N.B. Filestamp is actually on the last page.]

ORDER

Now on this 1 day of October, 2004, comes on for consideration **United States' Motion to Supplement Record** (document #41), and the Court, being well and sufficiently advised, finds that said motion should be, and same hereby is, **granted**.

IT IS SO ORDERED.

/s/ JIMM LARRY HENDREN
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

Trial Court—Attorney's Fees

U. S. DISTRICT COURT [9]
WESTERN DISTRICT ARKANSAS
FILED
OCT 0 1 2004
CHRIS R. JOHNSON, CLERK
BY */s/*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**
v. **Civil No. 03-5283**
PHILIP N. THARP, Individually and as Trustee for PHILIP N. THARP, a purported simple trust **DEFENDANT**

ORDER

Now on this 1 day of October, 2004, comes on for

[9] [N.B. Filestamp is actually at the foot of the page.]

consideration **United States' Itemized Attorney's Fees** (document #32), same being submitted pursuant to this Court's Order of August 6, 2004. There is no objection to the amount of the fees so itemized. The Court finds the sum reasonable, and therefore awards plaintiff attorney's fees as against defendant in the sum of Six Hundred Ninety-One and 35/100 Dollars ($691.35).

IT IS SO ORDERED.

/s/ JIMM LARRY HENDREN
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

This document entered on docket in compliance with Rule 59 and 79 (a), FRCP.

on *10-1-04* by */s/*

Trial Court—Denying Tharp's Motions

U. S. DISTRICT COURT [1]
WESTERN DISTRICT ARKANSAS
FILED
JUN 0 4 2004
CHRIS R. JOHNSON, CLERK
BY /s/
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**
v. **Civil No. 03-5283**
PHILIP N. THARP, Individually and as Trustee for PHILIP N. THARP, a purported simple trust **DEFENDANT**

ORDER

Now on this 4 day of June, 2004, come on for consideration the following motions:

* **Tharp's Objections To Discovery And His Various Dispostive Motions** (document #16);
* **Tharp's First Amended [2] Motion To Dismiss For Insufficiency of Service Of Process** (document #18);
* **Tharp's First Amended Motion To Dismiss For Insufficiency Of Process** (document #19);
* **Tharp's First Amended Motion To Dismiss For Failure To State A Claim** (document #20);

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[1] [N.B. Filestamp is actually on the last page.]

[2] [N.B. Originally, all motions were in one document.]

* **Tharp's First Amended Motion To Dismiss Or For Judgment On The Pleadings** (document #21);

* **Tharp's First Amended Motion To Dismiss For Lack Of Personal Jurisdiction** (document #22);

* **Tharp's First Amended Motion To Dismiss For Lack Of Subject Matter Jurisdiction** (document #23); [12]

and from said motions, and the response thereto, the Court finds and orders as follows:

1. This is a suit to recover taxes alleged to have been erroneously refunded to defendant, brought pursuant to **26 U.S.C. §7405**. Plaintiff alleges that defendant submitted two fraudulent tax returns claiming entitlement to tax refunds on behalf of a non-existent trust, when in fact the income reported on those returns was his income in his individual capacity, based upon which he was not entitled to the refunds. Plaintiff claims that it erred in paying the refunds pursuant to the tax returns, and now seeks to recover the amount of the refunds.

2. Defendant first moves to dismiss for lack of subject matter jurisdiction. His argument is frivolous. He contends that the "UNITED STATES OF AMERICA" or the "United States of America" or even the "UNITED STATES" is not the same entity as the "United States," and that only the "United States" is authorized to recover erroneous refunds under the terms of **26 U.S.C. §7405**. [3]

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[3] [n.1 in the original.] Defendant asserts several corollaries to this proposition in his various motions, all of which corollaries are equally frivolous. For example, he argues that he cannot be the defendant in this case since there is no plaintiff, since the "UNITED STATES OF AMERICA" is not authorized to bring the suit. The Court will not indulge defendant's propensity to play word games by further analysis

No authority is cited for this proposition, [4] and the Court rejects it. The basis for subject matter jurisdiction in this case is clear. See **28 U.S.C. §1340** and **28 U.S.C. §1345**. In addition, a claim brought pursuant to a federal statute supports federal question [⊥3] subject matter jurisdiction. **28 U.S.C. §1331**.

3. Defendant asserts an equally frivolous argument that the Court lacks personal jurisdiction over him. He claims that he is "Philip Neville Tharp," and the Complaint is against someone identified as "PHILIP N. THARP," whom he "declines to animate." He likewise "disclaims" his social security number. In the absence of some evidence that defendant is not the person to whom the plaintiff refunded the taxes, this argument is without merit. Given that in his Answer defendant admits receipt of the refund checks in question, this argument is frivolous on its face.

4. Defendant's objection to the sufficiency of process is his allegation that the summons does not bear the seal of the Court, as required by **F.R.C.P. 4(a)**. The returned summons is in the official file of this case, however, and it is embossed with the raised seal of the Court. This argument is without merit and the objection is overruled.

5. Defendant's objection to the sufficiency of service of process depends on the curious proposition that Arkansas is not within the territorial limits of the United States. This objection is nonsense and is overruled.

6. The motion for judgment on the pleadings repeats some of the wordplay arguments made in other motions, which do not merit further comment, but does raise the issue of a limitations bar said to be evident from the face

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of these frivolous arguments.

[4] [N.B. *But see* Tharp's First Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction, p.2, which cites *Lujan*, *Phillips Petroleum*, 31 U.S.C. § 321(d) and 28 U.S.C. 3002(15). And, IRC § 7405 speaks for itself.]

of the Complaint. The tax returns [14] in question were alleged to have been filed "on or about" October 17, 2000, and October 18, 2000, respectively, and the refunds to have been made "on or about" February 27, 2001, and May 15, 2001, respectively. The Complaint was filed on November 26, 2003. Defendant contends that the applicable statute of limitations is two years, pursuant to **26 U.S.C. §6532(b)**, and therefore plaintiff's claim is time-barred.

Section 6532(b) provides as follows:

> Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

Defendant takes the position that plaintiff's claim is based only on "error" (by which he understands "mistake of the plaintiff") because it is brought pursuant to **§7405**, which does not mention fraud. This argument overlooks the fact that a mistake on the part of the plaintiff could have been induced by fraud on the part of the defendant -- and indeed that is the gravamen of the Complaint in this case. **Section 6532(b)** clearly contemplates such a situation, by providing for a five-year statute of limitations for the recovery of "an erroneous refund" within five years "if it appears that any part of the refund was induced by fraud . . . ." Thus defendant's statute of limitations argument is without merit. [15]

7. The motion to dismiss for failure to state a claim is essentially a rehash of defendant' [5] wordplay arguments about the identity of the plaintiff. He contends that the

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[5] [N.B. As such in the original.]

plaintiff has "no known or identifiable interest in the matter," and plaintiff's attorney's have no authority to represent it. As noted above, these arguments -- unsupported by authority or convincing argument and frivolous on their face -- have no merit.

8. The Court notes that the plaintiff has been put to the effort of responding to various other issues which might be perceived as being raised by the documents filed by defendant, such as the possibility that a motion for summary judgment has been made. The Court does not believe that such a motion has actually been made, nor have other issues been raised merely by some allusion to them by the defendant.

Part of the problem arises because defendant apparently knows a variety of legal terms -- without any real comprehension of their meanings -- and has an imperfect understanding of a variety of legal concepts. He has mixed these terms and concepts into a stew of incoherent "reasons" for the positions he has taken. In addition, the defendant has a demonstrable propensity to play games with the judicial system, [6] and pretends a certain obtuseness [⊥6] that is belied by his own filings[7].

The Court is not impressed by such ploys. This is a straightforward case, between one plaintiff (the United

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[6] [n.2 in the original.] For example, in his Answer he avers that his "dwelling place" is 10498 Hazelton Road, Pea Ridge, Arkansas. In his Amended Answer, he denies that he resides in "this state", but shows the Hazelton Road address as his location with his signature.

[N.B. Apparently, it helped here to put the phrase in quotes occasionally. Still, HENDREN mentally substituted "State of Arkansas." It's just one more prime example of the fact that the federal jurists, trial ***and*** appellate, ***have no idea*** "where" they are. There comes a point in time that the vagueness (or misdirection) built into the system is ***so*** vast that it becomes its own Due Process violation.]

[7] [n.3 in the original.] For example, he claims, in his Amended Answer, "that he doesn't understand a word that is alleged against him."

States) and one defendant (Tharp), brought pursuant to a federal statute less than half a page long. Defendant, according to the address he subscribes to his pleadings, resides in the judicial district and division wherein this Court is located. Thus venue is properly laid. **28 U.S.C. §1391**. Personal jurisdiction was obtained by personal service of process upon the defendant at his dwelling in this district. The government's attorney is authorized to practice before this Court, pursuant to **Local Rule 83.5(d)**.

In addition, notwithstanding defendant's purported lack of comprehension, the Court does not believe he has any difficulty understanding that "United States," "UNITED STATES," "United States of America," and "UNITED STATES OF AMERICA" all refer to the same entity, and that entity is the plaintiff, regardless of whether it describes itself as a "complainant" or a "plaintiff." Likewise the Court believes that defendant comprehends that he is the defendant in this case, whether he is identified as "Philip Neville Tharp" or "PHILIP N. THARP," and even if his state of residence is abbreviated "AR" rather than spelled out "Arkansas." [17]

Plaintiff and defendant are the parties to this dispute, whether defendant likes being called "a party" or agrees with that designation or not. As a party, defendant is bound by all the obligations of a party under the **Federal Rules of Civil Procedure**. Failure to observe those obligations[8] -- including the obligation to make initial

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[8] [n.4 in the original.] Defendant invokes Haines v. Kerner, 404 U.S. 519 (1972), in support of his efforts as a *pro se* litigant. That case provides that the pleadings of *pro se* litigants are held "to less stringent standards than formal pleadings drafted by lawyers." It does not excuse a *pro se* litigant from following the rules of procedure. Ackra Direct Marketing Corp. v. Fingergut Corp., 86 F.3d 852 (8th Cir. 1996).

[N.B. That's in the Original Answer, not the First Amended Answer.]

disclosures and to cooperate in the discovery process -- may result in sanctions being imposed against him, up to and possibly including the striking of his Answer and the entry of default judgment.

IT IS THEREFORE ORDERED that **Tharp's Objections To Discovery And His Various Dispostive [9] Motions** (document #16) is **denied**;

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To Dismiss For Insufficiency Of Service Of Process** (document #18) is **denied**;

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To Dismiss For Insufficiency Of Process** (document #19) is **denied**;

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To Dismiss For Failure To State A Claim** (document #20) is **denied**;

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To Dismiss Or For Judgment On The Pleadings** (document #21) is **denied**;

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To** [⊥8] **Dismiss For Lack of Personal Jurisdiction** (document #22) is **denied**; and

IT IS FURTHER ORDERED that **Tharp's First Amended Motion To Dismiss For Lack Of Subject Matter Jurisdiction** (document #23) is **denied**.

IT IS SO ORDERED.

/s/ JIMM LARRY HENDREN
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

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[9] [N.B. As such in the original.]

Rule 14.1(i)(iii)—Rehearing

No rehearing sought or granted.

Rule 14.1(i)(iv)—Judgment of different date

No judgment of date different from the opinion.

Rule 14.1(i)(v)—Statutes and Rules

See the petition

Rule 14.1(i)(vi)—Additional Essential Materials

Authorization Letter

(SEAL) (two different filestamps of October, 2003)

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
SMALL BUSINESS/SELF-EMPLOYED
DIVISION COUNSEL
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(801) 799-0830
FAX (801) 799-0836

CC:SB:5:SLC:GL-155175-03
ICPlucinski

OCT 1 7 2003

The Honorable Eileen J. O'Connor
Assistant Attorney General
Tax Division
Department of Justice
555 4th Street, N.W.
Room 6126
Washington. D.C. 20001

Attention: Chief, Civil Trial Section
Central Region

In re: Philip Neville Tharp
10498 Hazelton Road
Pea Ridge, Arkansas 72751
SSN: [redacted in original] 8930
TIN: [redacted in original] 8264
Your ref: New

Dear Ms. O'Connor:

In accordance with the provisions of I.R.C. §§ 7401 and 7403, you are hereby authorized and requested to file an action, pursuant to I.R.C. S 7405, against Philip Neville Tharp, individually and in his role as trustee of an alleged trust identified as PHILIP N. THARP simple trust, for the recovery of two erroneous refunds plus interest in accordance with I.R.C. § 6602.

[remainder is redacted in the original]

Plaintiff's
Exhibit
3

Docket Sheet—Selected entries from p.5

INTERNAL USE ONLY: Proceedings include all events.
TERMED APPEAL
5:03cv5283 USA v. Tharp

10/1/04	42	ORDER by Honorable Jimm L. Hendren granting plaintif's [1] motion for attorney fees per order dated August 6, 2004 [32-1] in the amount of $691.35 (cc: all counsel) (jn) [Entry date 10/01/04]
10/1/04	43	ORDER by Honorable Jimm L. Hendren granting plaintiff's motion to supplement attached Second Declaration of Gregory E. Van Hoey in support of USA's Motion for Summary Judgment [41-1] [41-11] (cc: all counsel) (jn) [Entry date 10/01/04]
10/1/04	44	MEMORANDUM OPINION: by Honorable Jimm L. Hendren (cc: all counsel) (jn) [Entry date 10/01/04]
10/1/04	45	JUDGMENT: by Honorable Jimm L. Hendren granting plaintiff's motion for summary judgment [36-1] and judgment is entered in favor of plaintiff and against defendant in the sum of $13,192.65 with interest pursuant to 26 USC 6602, 6621 and 28 USC 1961(c)(1) until paid (cc: all counsel) (jn) [Entry date 10/01/04] [Edit date 10/04/04]
10/1/04	--	Docket Modification (Utility Event) dismissing case (jn) [Entry date 10/01/04]

Docket as of December 15, 2004 11:39 am Page 5 NON-PUBLIC

[1] [N.B. As such in the original.]

Docket Sheet—Selected entries from p.5

INTERNAL USE ONLY: Proceedings include all events.
TERMED APPEAL
5:03cv5283 USA v. Tharp

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10/1/04	--	Docket Modification (Utility Event) dismissing case (jn) [Entry date 10/01/04]

Docket as of December 15, 2004 11:39 am Page 5 NON-PUBLIC

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[1] [N.B. As such in the original.]